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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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SUBJECT INDEX

	PAGE
Opinions Below and Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Argument	3
I. The Petition For Writ of Certiorari Should be Denied For Failure to Comply With Rule 23 of This Court.	3
II. The Decision of the Court of Appeals Correctly Applies the Law of Res Judicata as Implemented by the Full Faith and Credit Statute	3
III. This Court's Decision in *Angel* v. *Bullington*, 330 U.S. 183 (1947) Supports, Rather Than Conflicts, With the Opinion of the Court of Appeals.	5
IV. The Power to Grant Mandamus is Not a Question Presented.	6
Conclusion	6

against him. The Court of Appeals held, in effect, that Filbrun was bound by the state court's final judgment that he could not litigate his action in Cook County, and therefore Petitioner was required to transfer the case upon the C & O's motion.

This decision is clearly correct. All issues required to be considered by Petitioner in passing on the C & O's motion had already been found against Filbrun by the state court. If Filbrun wanted to contest the correctness of the state court's final judgment against him on these issues his only remedy was appeal. He could not be allowed to succeed in his collateral attack upon the state court's judgment, which was the effect of Petitioner's refusal to order transfer. Otherwise an FELA plaintiff would be afforded multiple opportunities to contest the appropriateness of forums far distant from his home and place of accident. Filbrun wanted "... an encore" [*Angel* v. *Bullington*, 330 U.S. 183, 191 (1947)] and Petitioner gave it to him. The Court of Appeals correctly held he was not entitled to one.

The Court of Appeals found, and Petitioner does not seriously contest this finding, that if Filbrun had filed the same action in another state court in Cook County, his case would have been dismissed because of the conclusive determination of the Circuit Court that Cook County was an inconvenient and inappropriate forum. *Healea* v. *Verne*, 343 Ill. 325, 331-32, 175 N.E. 562, 565 (1931); *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 493, 103 N.E. 277, 231 (1913). The full faith and credit provisions of 28 U.S.C. §1738 required Petitioner to give the same effect to the judgment of the Circuit Court of Cook County, Illinois, as would another state court in Cook County. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870-71 (1st Cir. 1960).

The decision of the Court of Appeals does not in any way divest the federal court of jurisdiction. It is but an application and reaffirmation of the sound, well settled doctrine that a party does not have the right to litigate the same question twice; ". . . that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931). *E.g., Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611, 617 (1926).

The Court of Appeals' proper application of *res judicata*, as implemented by the full faith and credit statute, is not an event upon which certiorari need nor should be granted.

III.

This Court's Decision in Angel v. Bullington, 330 U.S. 183 (1947) Supports, Rather Than Conflicts, with the Opinion of the Court of Appeals.

Petitioner's contention that the opinion of the Court of Appeals is in direct conflict with *Angel* v. *Bullington*, 330 U.S. 183 (1947) is wide of the mark. That case does ***not*** hold ". . . that a plaintiff is not barred when some courts of the state are closed to him." (Petitioner's Petition, p. 8.) The holding, as Justice Frankfurter makes clear (330 U.S. at 189-90), is that a plaintiff who litigates in a state court his right to bring an action, where it is held that all the courts of the state are closed to him, cannot relitigate that same issue before a new forum in the same state even though, as here, that new forum is a United States District Court. Indeed, *Angel* v. *Bullington*, supra, seems clearly to support the decision of the Court of Appeals.

IV.

The Power to Grant Mandamus Is Not a Question Presented.

Rule 23 (1)(c) of this Court requires that this petition for certiorari be considered only upon the Question Presented or fairly comprised therein. The broadest reading of the Question Presented by Petitioner does not permit any contention concerning the power of the Court of Appeals to issue its writ of mandamus in this action. The question was not raised in the Court of Appeals at any time and is mentioned by Petitioner for the first time at page 8 of his Petition for Certiorari.

On the merits of the question, if such it is, it is clear that the Court of Appeals had power to grant mandamus in this action. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 220 F. 2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

CONCLUSION.

The decision of the Court of Appeals correctly applies the principles laid down in this Court's decisions and in the decisions of all other courts to the narrow question of *res judicata* involved in this case. No unsettled question of importance is presented. Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

ILL. REV. STAT. ch. 110, §77 (1961):

Judgments, decrees and orders subject to review—Leave to appeal from an order granting a new trial.

(1) Appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review the final judgments, orders or decrees of the circuit court, the superior court of Cook County, the county courts, the city courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to rules.

(2) An appeal may be taken from an order granting a new trial on leave granted by the reviewing court, or by a judge thereof in vacation, on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted upon notice given and motion filed within the 30 days or any extensions thereof. Application for an extension of time shall be accompanied by such record and other documents as may be prescribed by rule. The ruling of the court upon a petition for leave to appeal from an order granting a new trial is not reviewable.

(3) Leave to appeal shall first be obtained only if expressly required by law. As amended by act approved July 19, 1955. L. 1955, p. 2238.